

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ANTHONY CONIGILARO, Executor of the  
Estate of REVEREND HARRY S. CARLSEN,

UNPUBLISHED  
November 17, 2011

Plaintiff-Appellee,

v

CLYDE B. LAUER and RUTH E. LAUER,  
Individually and as Trustees of the CLYDE B.  
LAUER & RUTH E. LAUER REVOCABLE  
TRUST,

Nos. 299692/300840  
Jackson Circuit Court  
LC No. 09-001934-CH

Defendants-Appellants.

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Before: TALBOT, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

In this consolidated appeal, Clyde B. Lauer and Ruth E. Lauer challenge the judgment entered against them following a bench trial and an award of case evaluation sanctions<sup>1</sup> in favor of Anthony Conigilaro, executor of the estate of Reverend Harry S. Carlsen. We affirm.

In approximately 2006, Harry Carlsen was living in Pennsylvania with his wife Esther Carlsen and he asked Clyde Lauer to build them a home in Michigan. Carlsen later advised that he wanted to move into an already-constructed residence. Lauer eventually purchased a condominium in Jackson, Michigan (“the Jackson condominium”) for \$135,000 in the name of the Clyde B. Lauer and Ruth E. Lauer Revocable Trust. After the execution of the purchase agreement, but before the closing on the Jackson condominium, Lauer received two checks from Carlsen in the amounts of \$75,000 and \$63,000, totaling \$138,000. No documentation of any kind accompanied either check. Approximately one month after receiving the second check from Carlsen, Lauer closed on the Jackson condominium. The Carlsens then moved into the condominium. Five weeks later the Carlsens decided to move back to Pennsylvania.

Before the Carlsens returned to Pennsylvania, Lauer took them to dinner and advised that he would sell the Jackson condominium and provide them with the proceeds from the sale.

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<sup>1</sup> MCR 2.403(O)(5).

Shortly thereafter, Esther Carlsen died. Carlsen's attorney contacted Lauer regarding the return of the \$138,000. Lauer indicated in writing that he and Carlsen agreed that Lauer would sell the condominium that was bought for the Carlsens and return the money to Carlsen as soon as possible. It was then requested by Carlsen's attorney that the property be deeded to Carlsen. The following day Carlsen died.

Anthony Conigilaro was made the executor of Carlsen's estate. Carlsen's attorney sent a letter to Lauer advising that Carlsen had died and inquired regarding the status of Carlsen's assets in Michigan. Lauer responded by asserting that he owned the Jackson condominium.

On June 26, 2009, a complaint was filed against the Lauers by Conigilaro, in his capacity as the executor of Carlsen's estate. The complaint alleged that the Lauers purchased the Jackson condominium as agents for Carlsen, and that they breached their duty of loyalty by failing to convey the property to Carlsen's estate upon his death and any profits generated from rental of the property. Once discovery was completed, the matter was submitted to a case evaluation panel. The panel awarded Carlsen's estate \$110,000. The estate accepted, but the Lauers rejected the award.

The matter proceeded to a bench trial and the court ruled in favor of Carlsen's estate and determined that there was an agency relationship between Carlsen and Lauer for the purchase of the Jackson condominium, making it an asset of the estate. The estate was later awarded case evaluation sanctions of \$15,892.55.

The Lauers argue on appeal that the trial court erred in finding that an agency relationship existed between Carlsen and Lauer with respect to the purchase of the Jackson condominium. We disagree. "When there is a disputed question of agency, if there is any testimony, either direct or inferential, tending to establish it, it becomes a question of fact. . . ." <sup>2</sup> "An appellate court reviews a trial court's findings of fact for clear error." <sup>3</sup> "A finding of fact is clearly erroneous only if there is no evidence to support it or if the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been made." <sup>4</sup>

"An agency relationship may arise when there is a manifestation by the principal that the agent may act on his account. The test of whether an agency has been created is whether the principal has a right to control the actions of the agent." <sup>5</sup> In determining whether an agency relationship exists, a court must consider "every relation in which one person acts for or

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<sup>2</sup> *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n/Mich Ed Ass'n*, 458 Mich 540, 556-557; 581 NW2d 707 (1998) (citation omitted).

<sup>3</sup> *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243, 246; 533 NW2d 15 (1995).

<sup>4</sup> *Id.*

<sup>5</sup> *Meretta v Peach*, 195 Mich App 695, 697-698; 491 NW2d 278 (1992).

represents another by his authority.”<sup>6</sup> “[T]he manner in which the parties designate the relationship is not controlling, and if an act done by one person in behalf of another is in its essential nature one of agency, the one is the agent of such other notwithstanding he is not so called.”<sup>7</sup>

While no evidence was presented that Carlsen explicitly designated Lauer as his agent, the existence of an agency relationship may be demonstrated by circumstantial evidence.<sup>8</sup> Ample circumstantial evidence was presented to show that Carlsen had the final authority to approve or disapprove purchase of proposed properties, and Lauer was forced to abandon plans because Carlsen changed his mind. The timing and circumstances of the \$138,000 paid by Carlsen to Lauer is also circumstantial evidence that Carlsen made the payments to Lauer to repay him for purchasing the property on his behalf. Lauer also treated the Jackson condominium as if it belonged to Carlsen, despite it being deeded in the Lauers’ names. Lauer admitted that he told Carlsen he would return the money once the property sold. Lauer also referred to the money as belonging to Carlsen, which is circumstantial evidence that Lauer understood that he was acting as an agent for Carlsen in purchasing the property.

While Lauer testified at trial that the \$138,000 was a gift, the evidence supports the claim that Carlsen was paying Lauer as his agent for the Jackson condominium. Lauer admitted that he had never previously received a monetary gift in any amount from Carlsen. Also the amount given to Lauer constituted the vast majority of Carlsen’s liquid assets, which further supports that the \$138,000 was not a gift. The trial court, as the trier of fact, was free to disbelieve Lauer’s assertions.<sup>9</sup> Therefore, the trial court’s determination that an agency relationship existed between Lauer and Carlsen was not clearly erroneous.

Finally, the Lauers contend that the trial court’s award of case evaluation sanctions was improper. In challenging the award, the Lauers argue that the judgment does not meet the ten percent differential requirement of MCR 2.403(O)(3) and that the trial court overvalued the Jackson condominium in determining the amount of equitable relief awarded. In general, this Court reviews de novo a trial court’s decision to award case evaluation sanctions pursuant to MCR 2.403(O).<sup>10</sup> But, when an award of case evaluation sanctions is discretionary, this Court reviews the trial court’s decision to award sanctions for an abuse of discretion.<sup>11</sup> “An abuse of

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<sup>6</sup> *St Clair Intermediate Sch Dist*, 458 Mich at 557, quoting *Saums v Parfet*, 270 Mich 165, 170-171; 258 NW 235 (1935).

<sup>7</sup> *Van Pelt v Paull*, 6 Mich App 618, 624; 150 NW2d 185 (1967) (citation omitted; quotation omitted).

<sup>8</sup> *Id.* at 623-624 (citation omitted; quotation omitted).

<sup>9</sup> *Kelly v Builders Square, Inc*, 465 Mich 29, 40; 632 NW2d 912 (2001).

<sup>10</sup> *Harbour v Correctional Med Servs, Inc*, 266 Mich App 452, 465; 702 NW2d 671 (2005).

<sup>11</sup> *Id.*

discretion occurs when the [trial court's] decision results in an outcome falling outside the principled range of outcomes.”<sup>12</sup>

As delineated in the court rule addressing case evaluations: “If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party’s actual costs unless the verdict is more favorable to the rejecting party than the case evaluation.”<sup>13</sup> In applying this provision, “a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the case evaluation.”<sup>14</sup> In addition, following “this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation.”<sup>15</sup> While payment of sanctions by the rejecting party is mandatory under MCR 2.403(O)(1)<sup>16</sup>, an award of sanctions under MCR 2.403(O)(5) is discretionary if the verdict includes equitable relief. Specifically:

If the verdict awards equitable relief, costs may be awarded if the court determines that

(a) taking into account both monetary relief (adjusted as provided in subrule [O](3)) and equitable relief, the verdict is not more favorable to the rejecting party than the evaluation, and

(b) it is fair to award costs under all of the circumstances.<sup>17</sup>

“Equitable relief” comprises a nonmonetary remedy “such as an injunction or specific performance, obtained when available legal remedies, usually monetary damages, cannot adequately redress the injury.”<sup>18</sup> In this instance, the equitable relief awarded was the value of the Jackson condominium.

The Lauers mistakenly rely on the requirements imposed by MCR 2.403(O)(3) in their assertion of error regarding an award of sanctions. The mandatory nature of the sanction and the ten percent differential requirement of MCR 2.403(O)(3) is not applicable as the trial court instead, and in accordance with the discretion afforded to it, ordered sanctions pursuant to MCR 2.403(O)(5) based on the inclusion of equitable relief in the judgment.

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<sup>12</sup> *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

<sup>13</sup> MCR 2.403(O)(1).

<sup>14</sup> MCR 2.403(O)(3).

<sup>15</sup> *Id.*

<sup>16</sup> See also, *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 130; 573 NW2d 61 (1997).

<sup>17</sup> MCR 2.403(O)(5).

<sup>18</sup> Black’s Law Dictionary (9th ed).

The language of MCR 2.403(O)(5) is unambiguous in that it permits that “costs *may* be awarded” if the verdict includes equitable relief.<sup>19</sup> This subsection of the court rule does not provide for an award of mandatory sanctions if the monetary relief, separate from the equitable relief, alone fails to result in a more favorable verdict for the rejecting party. Under MCR 2.403(O)(5), a trial court is permitted to award sanctions if two circumstances are present: (1) the combined value of the monetary and equitable relief is not more favorable to the rejecting party *and* (2) it is “fair” to award such costs “under all the circumstances.” The subrule clearly indicates that a trial court may award sanctions where the monetary and equitable relief is not more favorable to the rejecting party if the trial court determined that it would be “unfair” given the circumstances of the case. Based on the combined value of the monetary and equitable relief granted in conjunction with the trial court’s determination regarding the fairness of an award of sanctions, the criteria of MCR 2.403(O)(5) was met.

We also reject the Lauers’ contention that the trial court wrongfully determined the amount of equitable relief granted by valuing the Jackson condominium at the time of Carlsen’s death rather than as of the date of judgment. The Lauers argue that the later valuation date is more accurate, given the depressed real estate market. While the trial court did not specifically articulate its method for determining the value of the Jackson condominium, based on the judgment it is clear that the trial court attributed a value of at least \$135,000 to the property. In contrast, the Lauers have submitted an affidavit suggesting the value of the property, at the time of judgment, was actually between \$95,000 and \$100,000. Using the reduced valuation would render the judgment to be more favorable to the Lauers than the case evaluation sanction and would preclude an award of sanctions.

Contrary to the Lauers’ assertion, this Court finds that the proper time for valuation of the property to be at the time of Carlsen’s death, consistent with the trial court’s finding of the existence of an agency relationship. “[T]he death of the principal revokes the authority of the agent.”<sup>20</sup> Consequently, the value of the subject matter pertaining to the agency relationship should be determined concurrent with termination of the relationship. Further support for valuation of the property at the time of Carlsen’s death is found in the tax code as valuations of a decedent’s estate are determined in accordance with the date of death.<sup>21</sup> In this instance, the condominium was purchased approximately four months before Carlsen’s death for \$135,000, which is consistent with the trial court’s determination of value for this asset.

Affirmed.

/s/ Michael J. Talbot  
/s/ E. Thomas Fitzgerald  
/s/ Jane E. Markey

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<sup>19</sup> Emphasis added.

<sup>20</sup> *In re Estate of Capuzzi*, 470 Mich 399, 402; 684 NW2d 677 (2004).

<sup>21</sup> 26 USC 2031.